THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0018, Robert Bruce v. New American Homes, LLC, the court on November 5, 2007, issued the following order:

The defendant, New American Homes, LLC, appeals from orders of the superior court denying its motion to vacate an arbitration award upon the basis that it failed to submit an arbitration transcript, and denying its motion to reconsider and to stay the ruling upon the motion to vacate pending the preparation of a transcript. The defendant argues that the trial court "unreasonably and arbitrarily refused to allow [it] to submit a record," thereby depriving it of due process and the right to a remedy. We reverse and remand.

At the outset, we note that the defendant did not raise its constitutional arguments in the trial court. Accordingly, we limit our review to whether the trial court unsustainably exercised its discretion by denying the defendant's motion for reconsideration. Cf. State v. Lavallee, 145 N.H. 424, 426 (2000).

Judicial review of an arbitration award is limited to whether the arbitrators engaged in plain mistake or exceeded their powers, or whether the parties or arbitrators engaged in fraud, corruption, or misconduct. See RSA 542:8 (2007); Southwestern Trans. Co. v. Durham, 102 N.H. 169, 178 (1959). It is the burden of the party seeking to vacate an arbitration award for plain mistake to present so much of a record of the arbitration as is sufficient to show plain mistake. See Rand v. Aetna Life & Cas. Co., 132 N.H. 768, 772 (1990).

Although RSA 542:8 allows any party to "apply to the superior court for an order" confirming, correcting, modifying, or vacating an arbitration award, the statute does not specify the form that the application should take. A party may, generally, file a petition in equity, cf. Rand, 132 N.H. at 769-70, in which case the parties will have the opportunity at the initial structuring conference to discuss the availability and necessity of a transcript of the arbitration, see Super. Ct. R. 62 (I). Alternatively, and to the extent a matter relative to the underlying dispute has already been opened, a party may file a motion to confirm, correct, modify, or vacate the award in that matter. Cf., e.g., Merrill Lynch Futures v. Sands, 143 N.H. 507, 509 (1999). To the extent a party files a motion, the motion is resolved pursuant to the rules generally applicable to motions.

The record here reflects that the plaintiff commenced an action in superior court to recover for alleged construction defects. The trial court stayed the action pursuant to a mandatory arbitration provision in the parties' construction

contract, and after the arbitrator issued an award, the defendant filed a motion to vacate the award, alleging plain mistake and that the arbitrator exceeded his authority. The defendant appended to the motion the contract, the arbitration award, and a memorandum that the defendant had submitted to the arbitrator, but did not append an arbitration transcript or state whether a transcript was available. The trial court denied the motion, finding that a transcript was required to decide the claims of error raised by the defendant.

The defendant moved to reconsider, asserting that a record of the arbitration hearing had been made, and requesting that the trial court stay its order denying the motion to vacate until after a transcript had been prepared and submitted for the trial court's consideration. The trial court denied the motion, finding that it was "too late to correct the failure to present a record."

Although the trial court did not err by deciding the motion to vacate upon the basis of the record that had been submitted with the motion, we conclude that the trial court unsustainably exercised its discretion, under the facts of this case, by not allowing the defendant an opportunity to re-open the record. The trial court offered no support for its conclusion that it was "too late to correct the failure to present a record," nor are we aware of any. To the contrary, RSA 542:8 is silent as to the procedure to follow in seeking relief, and the trial court always has discretion upon reconsideration to re-open the record and to allow the parties to submit additional evidence. See Smith v. Shepard, 144 N.H. 262, 265 (1999). Moreover, we note that at the time that the trial court concluded that it was "too late" to submit a transcript, the deadline for seeking relief under RSA 542:8 had not yet passed, and would not pass for another nine months.

In view of the lack of prejudice to the plaintiff in allowing a transcript to be prepared, the lack of clarity in the statute regarding the procedure for seeking relief under RSA 542:8, and our preference that cases be decided upon the merits, see, e.g., Whitaker v. L.A. Drew, 149 N.H. 55, 59 (2003), we conclude that it was error not to re-open the record in this case. We reverse and remand for further proceedings consistent with this order.

Reversed and remanded.

DUGGAN, GALWAY and HICKS, JJ., concurred.

Eileen Fox,
Clerk